

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THOMAS C. DeHAVEN)	
Claimant)	
VS.)	
)	Docket No. 180,281
WESCON PRODUCTS COMPANY)	
Respondent)	
AND)	
)	
INSURANCE COMPANY OF NORTH AMERICA)	
Insurance Carrier)	

THOMAS C. DeHAVEN)	
Claimant)	
VS.)	
)	Docket No. 186,129
WESCON PRODUCTS COMPANY)	
Respondent)	
Self-Insured)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Both the self-insured respondent Wescon Products Company and the Kansas Workers Compensation Fund appealed the Award entered by Administrative Law Judge John D. Clark on February 20, 1995. Appeals Board member Duncan Whittier has recused himself from this case. Mr. Jeffery K. Cooper has been appointed the Appeals Board member Pro Tem in his place. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Chris A. Clements of Wichita, Kansas. Respondent, Wescon Products Company, a self-insured, appeared by its attorney, Ross A. Hollander of Wichita, Kansas. Respondent, Wescon Products Company, and its insurance carrier, the Insurance Company of North America, appeared by W. John Badke of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by Scott J. Mann of Hutchinson, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

At the request of the claimant, these two separately docketed cases which are the subject of this appeal were consolidated for litigation purposes before the Administrative Law Judge. Both the self-insured respondent Wescon Products Company and the Kansas Workers Compensation Fund (Fund) raised the following issue:

- (1) Nature and extent of claimant's disability.

The Fund requested Appeals Board review of the following additional issue:

- (2) The liability of the Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing arguments of the parties, the Appeals Board finds as follows:

- (1) Docket No. 180,281 involved injuries claimant received to his upper extremities from a series of accidents beginning April 12, 1993, and continuing each and every working day thereafter through July 27, 1993, while working for respondent Wescon Products Company and per stipulation of the parties insured by the Insurance Company of North America. Docket No.186,129 involved injuries claimant alleged to have received to his upper extremities from a series of accidents beginning October 1, 1993, and continuing each and every day through April 6, 1994, while employed by the self-insured respondent, Wescon Products Company.

The respondent and its insurance carrier, Insurance Company of North America, entered into an Agreed Award with the claimant in Docket No.180,281 on May 4, 1994. The Agreed Award entitled the claimant to permanent partial general disability benefits based on an 11 percent functional impairment rating to the body as a whole. The Agreed Award was

a weekly running award for 415 weeks of benefits at \$32.46 per week utilizing a date of accident of April 12, 1993. Thereafter, on August 5, 1994, the claimant filed an Application/Motion for Review and Modification of the Agreed Award. Before the review and modification motion was filed, the claimant filed an Application for Hearing on January 13, 1994, which alleged injuries to claimant's upper extremities occurring while employed by the self insured respondent from October 1, 1993, and each every day thereafter through April 6, 1994. That Application for Hearing was assigned Docket No. 186,129 which is also a subject of this appeal.

The Administrative Law Judge in his Award denied claimant's request to review and modify the Agreed Award entered in Docket No. 180,281. The Administrative Law Judge found claimant had sustained additional injuries to his upper extremities while working for the respondent from October 1, 1993 through April 6, 1994, as alleged by the claimant in Docket No. 186,129. The Administrative Law Judge found as a result of that series of accidents, claimant was entitled to permanent partial general disability benefits based on work disability in the amount of 77 percent. The Administrative Law Judge further found the Fund liable for 100 percent of the Award and a K.S.A. 44-510a credit was appropriate to be applied against the awarded benefits for the overlapping weeks contained in the Agreed Award dated May 4, 1994, in Docket No. 180,281. For reasons set forth below, the Appeals Board finds the Administrative Law Judge's Award should be affirmed.

The decisive question that had to be answered in this case was whether claimant sustained a new and distinct injury while working for the respondent in Docket No. 186,129 from October 1, 1993 through April 6, 1994, or whether claimant's increased symptoms were a natural and probable consequence of the injuries claimant received in Docket No. 180,281 from April 12, 1993 through July 27, 1993.

For the injuries claimant received as a result of the series of accidents constituting the first accident, claimant was treated by J. Mark Melhorn, M.D., an orthopedic surgeon located in Wichita, Kansas, who specializes in hand surgery. Dr. Melhorn performed bilateral carpal tunnel syndrome and ulnar nerve releases in June of 1993. Claimant was released from Dr. Melhorn's care for regular work on July 27, 1993. Dr. Melhorn opined that as a result of claimant's work related injuries he had a 10 percent whole body functional impairment. The doctor placed permanent restrictions on claimant's activities limiting his lifting to 50 pounds for a single lift and 25 pounds for frequent lifting. Claimant returned to his regular job as conduit machine operator which required claimant to use his hands in a rapid repetitive manner.

Claimant's hands, again, became symptomatic and he returned to Dr. Melhorn for treatment on October 14, 1993. At that time, Dr. Melhorn treated claimant conservatively with no surgical intervention. The doctor released the claimant from his care on December 30, 1993, opining that claimant had sustained no additional permanent functional impairment. However, Dr. Melhorn increased claimant's permanent restrictions to 35 pounds for a single lift and 20 pounds for frequent lifting. Dr. Melhorn also opined claimant had

suffered a second injury when a new process began after claimant returned to work following his bilateral upper extremities surgeries. Dr. Melhorn diagnosed claimant's current problem as tendinitis.

Dr. Ernest Schlachter examined and evaluated the claimant at the request of his attorney after each series of accidents. Dr. Schlachter first examined claimant on September 10, 1993, for the first series of accidents from April 12, 1993 through July 27, 1993. Dr. Schlachter diagnosed overuse syndrome of both upper extremities with bilateral carpal syndrome, previously operated. A 12 percent whole body functional impairment was assessed by Dr. Schlachter causally related to claimant's repetitive work activities. Permanent restrictions were placed on the claimant by Dr. Schlachter of no repetitive pushing, pulling, twisting, or grasping motions with either arm or hand. No use of vibratory tools or working in cold environments. No repetitive lifting of more than 10 pounds with either arm or hand and no single lifts of more than 15 pounds with either arm or hand. The doctor further recommended that claimant should not continue to perform his current repetitive work activities for the respondent as his occupation was outside those limitations. If claimant would continue those activities Dr. Schlachter opined that he would develop increased symptomatology.

Dr. Schlachter again examined the claimant on May 5, 1994, for the second series of accidents alleged to have occurred from October 1, 1993 through April 6, 1994. Dr. Schlachter diagnosed overuse syndrome of both upper extremities with bilateral carpal tunnel syndrome, previously operated and beginning overuse syndrome of both shoulder girdles. Dr. Schlachter opined claimant suffered a new injury when he returned to performing his regular work activities after the bilateral hand surgeries. The doctor assigned a permanent functional impairment rating of 17 percent as a result of the new injury. Dr. Schlachter imposed the same restrictions on the claimant as he had in 1993, except he lowered the lifting restriction to 10 pounds for single lifts and 8 pounds for frequent lifts.

The Fund sent claimant to George L. Lucas, M.D., an orthopedic surgeon in Wichita, Kansas, to examine and evaluate the claimant on its behalf. Dr. Lucas examined the claimant once on February 21, 1994. At that time, Dr. Lucas had been supplied prior medical records in regard to claimant's treatment including the records of Dr. Melhorn. Dr. Lucas opined claimant had not suffered additional injury as a result of returning to work for the respondent after his bilateral hand surgeries. The doctor opined claimant's permanent functional impairment was a result of claimant's original injury and was not increased by the subsequent series of the alleged accidents. Dr. Lucas did not find any evidence that claimant had tendinitis.

The Appeals Board finds the most credible and persuasive medical evidence contained in the record consists of the opinions of Dr. Melhorn and Dr. Schlachter. Both these physicians saw the claimants after each of the series of accidents and were therefore in a better position to determine whether claimant sustained additional injury as a result of the second series of accidents. Accordingly, based on their opinions, the Appeals Board finds

claimant's work activities, following his bilateral hand surgeries, did cause additional permanent injury to claimant's upper extremities. Both Dr. Melhorn and Dr. Schlachter placed more severe permanent restrictions on claimant following claimant's return to work. Dr. Schlachter also opined that claimant sustained additional permanent functional impairment after the second series of accidents.

Following the second series of accidents, the respondent was unable to find claimant a job that would accommodate his additional restrictions. Claimant was terminated by the respondent with his last day of work being April 6, 1994. The Administrative Law Judge found April 6, 1994, was the appropriate date of accident for this second series of accidents based on the Kansas Court of Appeals case of Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). In that case, the court held that the appropriate date of accident for a repetitive use condition was the day claimant left work because of the injury. The Appeals Board agrees with that finding and adopts April 6, 1994, as the date of accident in Docket No. 186,129.

The Administrative Law Judge found that the claimant was eligible for a work disability after the second series of accidents in the amount of 77 percent. The Administrative Law Judge utilized the work disability test contained in K.S.A. 44-510e effective July 1, 1993. The Administrative Law Judge adopted Dr. Schlachter's opinion that claimant had lost the ability to perform 54 percent of the work tasks he had performed in jobs in the 15 year period preceding the accident. The Administrative Law Judge then averaged, as required by K.S.A. 44-510e, the work tasks loss with the difference between claimant's average weekly wage he was earning at the time of injury and the average weekly wage he was earning after injury. In this case, claimant had a 100 percent wage loss because claimant was unemployed at the time of the regular hearing. The Appeals Board finds that the work disability evidence in the record which was presented by the claimant was uncontradicted, and therefore, affirms the Administrative Law Judge's finding that claimant was entitled to permanent partial disability benefits based on work disability in the amount of 77 percent.

The Appeals Board also affirms the Administrative Law Judge's finding that the respondent and/or the Fund was entitled to a reduction in the Award pursuant to K.S.A. 44-510a. Dr. Schlachter testified that claimant's pre-existing disability contributed 100 percent to his latest disability. As previously noted, the claimant received permanent partial weekly benefits for injuries to his upper extremities in an Agreed Award dated May 4, 1994, for the first series of accidents. Accordingly, for all overlapping weeks of permanent partial disability benefits, the Agreed Award will be credited against the 77 percent work disability awarded herein.

The parties stipulated to an average weekly wage of \$431.41 in Docket No. 186,129 making the weekly compensation rate \$287.62 for the purpose of calculating the Award. The \$287.62 weekly compensation rate is then reduced by the permanent partial disability weekly rate of \$32.46 in Docket No. 180,281 resulting in a reduced weekly compensation rate for Docket No. 186,129 in the amount of \$255.16. All of the permanent partial disability weeks

awarded are to be paid at the reduced rate, as the 319.55 permanent partial disability weeks which claimant is entitled to in Docket No. 186,129 overlap with the permanent partial disability weeks awarded in Docket No. 180,281. The Administrative Law Judge calculated his Award based on a reduced weekly compensation rate of \$254.89 instead of \$255.16 which the Appeals Board finds represents the correct reduced compensation rate.

(2) The Appeals Board concludes that the decision of the Administrative Law Judge to assess all the liability for this Award against the Fund should be affirmed. The Appeals Board agrees with the Administrative Law Judge's analysis of the evidence in regard to this issue. Furthermore, the Appeals Board finds that the Administrative Law Judge's findings and conclusions in regard to this issue are accurate and appropriate and the Appeals Board adopts those findings and conclusions as its own.

The Appeals Board otherwise adopts all findings and conclusions made by the Administrative Law Judge not inconsistent with the expressed rulings made in this Order.

AWARD

Docket No. 180,281

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Application/Motion for Review and Modification filed by the claimant, pursuant to K.S.A. 44-528 in regard to the Agreed Award entered by Administrative Law Judge John D. Clark on May 4, 1994, is hereby, denied. Therefore, the Appeals Board affirms the decision of the Administrative Law Judge pertaining to this docket number.

AWARD

Docket No. 186,129

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated February 20, 1995, is hereby, affirmed as it relates to the 77 percent work disability award and modified due to the calculation of the reduced weekly compensation rate:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Thomas C. DeHaven, and against the respondent, Wescon Products Company, a qualified self-insured, and the Kansas Workers Compensation Fund for an accidental injury sustained on April 6, 1994, with an average weekly wage of \$431.41.

Claimant is entitled to 319.55 weeks of permanent partial disability compensation at the reduced rate of \$255.16 per week or \$81,536.38 for a 77% permanent partial general bodily disability making a total award \$81,536.38.

As of December 27, 1996, there is due and owing claimant 142.29 weeks of permanent partial compensation at the reduced rate of \$255.16 per week for a total of \$36,306.72 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$45,229.66 is to be paid for 177.26 weeks at the reduced rate of \$255.16 per week, until fully paid or further order of the Director.

The Kansas Workers Compensation Fund is ordered to pay 100% of the Award and costs in this matter.

All other orders of the Administrative Law Judge are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of December 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
Ross A. Hollander, Wichita, KS
W. John Badke, Wichita, KS
Scott J. Mann, Hutchinson, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director